In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 910

HENRY R. DRENT, ET AL., PETITIONERS

v.

COLONEL WILLIAM A. MCKEAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the district court dismissing the application for an order to show cause (Pet. App. A-3) is unreported. The order of the court of appeals denying petitioners' motion to reinstate their application for an order to show cause (Pet. App. A-1) is likewise unreported.

JURISDICTION

The order of the court of appeals (Pet. App. A-1) denying petitioners' motion to reinstate their applica-

tion for an order to show cause was entered on October 7, 1968. The petition for a writ of certiorari was filed on January 6, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the ordering of petitioners, members of the National Guard, to active duty pursuant to Section 101(e) of Public Law 89-687 violated their enlistment agreements.

2. Whether reservists, ordered with their units to active duty under Public Law 89-687, may be assigned to other units.

STATUTES INVOLVED

* * * *

Section 101(e) of Public Law 89-687 (80 Stat. 981) provides:

> (e) Notwithstanding any other provision of law, until June 30, 1968, the President may, when he deems it necessary, order to active duty any unit of the Ready Reserve of an armed force for a period of not to exceed twenty-four months.

10 U.S.C. 673(a) provides:

> In time of national emergency declared by the President after January 1, 1953, or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons concerned, order any unit, and any member not assigned to a unit organized to serve as a unit, in the Ready Reserve under the

jurisdiction of that Secretary to active duty (other than for training) for not more than 24 consecutive months.

STATEMENT

Petitioners are members of a New Jersey National Guard unit ordered to active federal service pursuant to the provisions of Subsection 101(e) of P.L. 89-687. They filed an "Application for order to show cause and for writ of habeas corpus" in the United States District Court for the Northern District of Alabama, alleging they had been ordered to active duty illegally.[1] Their basic contention was that Public Law 89-687 could not constitutionally be applied to them, since the agreements under which they had joined the National Guard allegedly made no provision for a 24 months' call-up.

The district court denied the application for an order to show cause on October 4, 1968, (Pet. App. A-3), and the court of appeals denied *per curiam* petitioners' motion to reinstate the petition for an order to show cause (Pet. App. A-1). On October 12, 1968, Mr. Justice Black denied a stay of military orders transferring some of petitioners to Viet Nam, and Mr. Justice Douglas similarly denied a stay on November 18, 1968 (Pet. 7).

---

[1] The wives of the guardsmen are also parties, alleging that their husbands were unlawfully activated. As their claims are based on those of their husbands, the term "petitioners" as used herein for convenience shall refer only to the husbands.

ARGUMENT

1. The National Guard unit to which petitioners are attached was called to active duty pursuant to Section 101(e) of Public Law 89-687, which became effective on October 15, 1966. That provision authorizes the President, "when he deems it necessary, [to] order to active duty any unit of the Ready Reserve of an armed force for a period of not to exceed twenty-four months." National Guard units are units of the Ready Reserve. 10 U.S.C. 269(b); 10 U.S.C. 261; 10 U.S.C. 3497.

Petitioners' principal contention is that, since Public Law 89-687 was enacted after they had signed their enlistment contracts, calling them to active duty violated their rights under such agreements. This same argument was rejected by the district court and Fourth Circuit in *Morse* v. *Boswell*, 289 F.Supp. 812 (D. Md.), affirmed, 401 F.2d 544, certiorari denied, No. 764, this Term, January 20, 1969,[2] and the same reasoning is equally persuasive here.

As was observed in *Morse* v. *Boswell, supra*, all applicable statutes in effect when petitioners signed the enlistment agreements were incorporated therein by reference. 289 F. Supp at 814. See, *e.g.*, *Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398, 435. Among the statutes in effect at the time they enlisted was 10 U.S.C. 673(a), which provides that "[i]n time of national emergency declared by the

---

[2] In their "Application for order to show cause and for writ of habeas corpus" filed in the district court, at p. 15 petitioners asserted that their claims were similar to *Morse* v. *Boswell*, then pending before this Court on the application for a stay.

President after January 1, 1953, or *when otherwise authorized by law,*" the Secretary of Defense may, "without the consent of the persons concerned, order any unit * * * in the Ready Reserve * * * to active duty * * for not more than 24 consecutive months" (emphasis added).

Thus, in their enlistment papers petitioners agreed that they could be called to active duty for up to 24 months "when * * * authorized by law." Public Law 89-687 is a "law" within that phrase which authorized their call to active duty.[3] Although petitioners argue that the phrase "when * * * authorized by law" refers only to laws in existence at the time they signed their enlistment agreements and does not cover laws subsequently enacted, that contention was recently rejected in a well-reasoned opinion by District Judge Dooling in *Winters* v. *United States*, 281 F. Supp. 289 (E.D. N.Y.), affirmed *per curiam*, 390 F. 2d 879 (C.A. 2), certiorari denied, 391 U.S. 896. In holding that provisions in an enlistment agreement signed by a Marine Corps reservist authorizing his call to active

---

[3] Another law which authorized petitioners' call to active duty is 10 U.S.C. 263, which provides that "[w]henever Congress determines that more units and organizations *are needed for the national security* than are in the regular components of the ground and air forces," the Army National Guard and the Air National Guard together with units of other reserve components necessary for a balanced force, "shall be ordered to active duty and retained as long as so needed" (emphasis added). Thus, in Public Law 89-687, Congress has made a determination, as contemplated by 10 U.S.C. 263, that more reserve units on active duty, including National Guard units, "are needed for the national security." See also 10 U.S.C. 262 and 10 U.S.C. 672.

duty when "otherwise prescribed by law" and "as the law may require" include laws enacted after he had signed the agreement, that court stated (281 F. Supp. at 295-296):

> Neither the enlistment contract nor the Statement of Understanding says in so many words that it means duty prescribed by law whether already enacted or hereafter passed, but that is the evident and necessary meaning of any language so used in such instruments. Were such instruments construed otherwise they would in effect fetter and embarrass the power of the President and the Secretary of Defense to adopt uniform and practical regulations for the administration of the armed forces and the Ready Reserve, and could indeed operate indirectly as a fetter upon the Congress itself, which would have to take action in contemplation of the existence of a large number of such agreements in force at any one time, and which it would be only appropriate, even if not necessary, that the Congress should consider in enacting new law.

This reasoning is equally applicable to the situation involved in the instant case, and compels the conclusion that the calling of petitioners to active duty pursuant to Public Law 89-687 did not violate the terms of their enlistment agreements.[4] See *Morse* v. *Boswell, supra; Goldstein* v. *Clifford*, 290 F. Supp 275 (D. N.J., statutory three-judge court). In short, pe-

[4] Additionally, as we pointed out in our "Memorandum for Respondents in Opposition to Petition for Stay" filed with this Court on November 14, 1968, petitioners call-up was authorized by the express language of their enlistment contracts.

titioners' enlistment agreements gave them no vested right to be free from future changes in the pertinent statutes.

2. Petitioners argue that Public Law 89-687 did not in absolute terms authorize their call to active duty for a period of 24 months. Section 101(c) of Public Law 89-687, they maintain, requires that they be given credit for any time that certain of them, as individuals, had previously served on active duty. But Section 101(e) specifically says, "Notwithstanding any other provision of law, until June 30, 1968, the President may, when he deems it necessary, order to active duty any unit of the Ready Reserve of an armed force for a period of not to exceed twenty-four months." A call to active duty of a reserve unit necessarily involves a call of its individual members, and the most reasonable construction of the statute is that Congress contemplated that the unit—and the unit's individual members—could be ordered to active duty for 24 months, without regard to their previous service. Nor would such a construction deprive petitioners of equal protection. As the district court pointed out in *Morse* v. *Boswell*, "rational differences in treatment of units and individuals are clearly not violations of [equal protection] concepts". 289 F. Supp. at 819. In activating reservists, "Congress could sensibly decide that trained units are more valuable and more needed than individual reservists" (*ibid.*). And, once a reserve unit has been activated, if the military authorities believed that there was no longer any military necessity for the unit's serving together as a full unit, it can scarcely be said that the military does not have the

right to assign the individual unit members to other units. See *Orloff* v. *Willoughby*, 345 U.S. 83, 93-94.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.

MORTON HOLLANDER,
ROBERT E. KOPP,
Attorneys.

FEBRUARY 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 332085 462